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Subject: Holdout states last hope to help ease Microsoft's grip on U.S. consumers

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comment on antitrust settlement with Microsoft

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BY DAN GILLMOR

Mercury News

So it's down to a few states that have enough money to fight and refuse to be bullied. They are American consumers' last hope for an outcome that doesn't leave Microsoft on a clear path toward controlling the choke points of tomorrow's commerce and communications.

No one should be surprised that half of the state attorneys general have given up. A few undoubtedly believe the Justice Department's sellout achieved something. Others were just along for the ride and are feeling Microsoft's -- and the federal government's -- enormous lobbying pressure. Watch the campaign contributions flow to see what may have happened with at least some of the politicians who were handling this lawsuit.

If U.S. District Judge Colleen Kollar-Kotelly, who's now hearing the case, has any courage, the Tunney Act hearing should be extremely revealing. There are so many questions raised by the malodorous deal cut by the Justice Department that it's hard to know where to begin.

The best place to start is with the bizarre settlement itself. The document reads as though it had been written by Microsoft lawyers. Every time you read an item that suggests actual restraint on Microsoft's behavior, you find weasel language elsewhere that undermines the supposed concession. This thing isn't just full of loopholes. It's meaningless.

For instance:

Why did the lawbreaker get to keep the loot it made from violating the law? Do we give bank robbers the same courtesy?

Why does this settlement implicitly give Microsoft the right to withhold information about its programming interfaces to open-source and free software writers?

Microsoft, in its sole authority, gets to decide what goes into Windows. Since that eviscerates every other provision in the agreement, why bother with this charade at all?

It would also be useful to put some key people under oath, to answer questions about the politics of this case. For instance:

Why did none of the non-political professional staff members who worked on this case support the settlement? Have they been ordered to keep their mouths shut? If so, why?

What was the substance of the summer conversation between Vice President Dick Cheney and Microsoft Chief Executive Steve Ballmer?

Attorney General John Ashcroft's deputy chief of staff-- a Microsoft shareholder and former official of the Republican Party, which got massive Microsoft campaign ``contributions"-- reportedly told Microsoft opponents to back off even after he'd supposedly recused himself from the case. He's denied the report, but let him do so under penalty of perjury. (Oh, wait, who'd prosecute? This Justice Department?)

There's another angle that the media, in particular, need to examine as quickly as possible. Is it possible that Microsoft and the government have made some secret arrangements that will be couched under ``anti-terrorism" rhetoric when or if they emerge into the public light? The government's new surveillance powers would be far easier to carry out if Microsoft became a government ally in this area.

Have there been such side deals? I hope not. I would prefer to think that Microsoft was rewarded by an administration that opposes antitrust enforcement on ideological grounds, as this one surely does.

California deserves special credit for its stance. Bill Lockyer, the state attorney general, has emerged as the most important public official in America when it comes to holding back the Microsoft tide.

This means that Microsoft, with its bottomless pockets and utter ruthlessness, now loathes him more than any other public official. Contact Lockyer's office at (916) 322-3360 and express your support. He needs to hear from people who understand what's at stake.

Dan Gillmor's column appears each Sunday, Wednesday and Saturday. E-mail dgillmor@sjmercury.com; phone (408) 920-5016; fax (408) 920-5917. PGP fingerprint: FE68 46C9 80C9 BC6E 3DD0 BE57 AD49 1487 CEDC 5C14.

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